Hassan bin Abdul Karim v Perdana Menteri, Tan Sri Dato' Hj Mahiaddin bin Md Yasin & Anor

HIGH COURT (JOHOR BAHRU) — JUDICIAL REVIEW NO JA-25–2–01 OF 2021
EVROL MARIETTE PETERS JC
24 MAY 2021

Constitutional Law — Emergency Proclamation ('Proclamation') — Validity of Ordinance promulgated during Emergency — Parliamentarian applied for leave to file judicial review ('JR') application to, inter alia, declare invalid Ordinance promulgated by Yang di-Pertuan Agong during Emergency — Applicant also sought order to direct Executive to do all things necessary to table Proclamation and Ordinance before Parliament for annulment — Whether leave application had to be dismissed as art 150(8) of Federal Constitution ousted court's jurisdiction to entertain any application, question or proceeding regarding validity of Proclamation or of any Ordinance made thereunder or the continued operation of such Proclamation or Ordinance — Whether words in art 150(8) were explicit enough to bar even an application for leave to file judicial review

On 11 January 2021, the Yang di-Pertuan Agong ('YDPA') issued a Proclamation of Emergency ('Proclamation') pursuant to art 150(1) of the Federal Constitution ('FC'). Sixteen days later, the applicant, a Parliamentarian and State Assemblyman, applied to the High Court for leave to file a judicial review application seeking: (a) a declaration that ss 11 and 14–15 of the Emergency (Essential Powers) Ordinance 2021 ('the Ordinance') (which was promulgated by the YDPA under the Emergency) were invalid, unconstitutional and null and void for being inconsistent with the provisions of the FC; (b) a declaration that art 150(8) of the FC (an ouster clause) was unconstitutional, null and void and of no effect for being inconsistent with arts 4(1) and 121(1) of the FC; alternatively, that art 150(8) did not preclude the Court from judicially reviewing the exercise of power under the Ordinance; (c) a declaration that the respondents were duty-bound under art 150(3) of the FC to advise the YDPA to summon Parliament for the Proclamation and the Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with art 150(3); and (d) orders of mandamus directing the respondents to lay the Proclamation and the Ordinance before both Houses of Parliament in accordance with the provisions of art 150(3); alternatively, to advise the YDPA to summon a meeting of Parliament in accordance with the provisions of art 150(3). Article 150(6) provided, inter alia, that no provision of any Ordinance promulgated under art 150 shall be invalid on the ground of inconsistency with any provision of the FC. Article 150(8) provided that notwithstanding

anything in the FC, the YDPA's issuance of the Proclamation or promulgation of any Ordinance could not be subjected to any challenge or question in any court on any ground and that no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity or continued operation of either the Proclamation or any Ordinance promulgated under art 150(2B) of the FC.

Held, dismissing the leave application:

(1) Since the impediments in cll (6) and (8) of art 150 of the Federal Constitution ('the FC') were not capable of being surmounted, the court was unable to allow the applicant's leave application. The words in art 150(8) were explicit enough to include even an application for leave to file judicial review (see paras 21 & 32).

(2) Article 150(8) appeared to provide a double bar to judicial scrutiny as it was prefaced with the words 'Notwithstanding anything in this Constitution' indicating that art 150(8) not only prevailed over any other law, but that it also superseded any other provision in the FC. As such art 150(8) overrode not only art 121 but also arts 43–44 and 71 as well — provisions which the applicant contended were inconsistent with art 150 of the FC (see para 22).

(3) Article 150(6) of the FC provided that no provision of any Ordinance promulgated under art 150, and no provision of any Act of Parliament which was passed while a Proclamation of Emergency was in force and which declared that the law appeared to Parliament to be required by reason of the Emergency, shall be invalid on the ground of inconsistency with any provision of the Federal Constitution (see para 19).

[Bahasa Malaysia summary

Pada 11 Januari 2021, Yang di-Pertuan Agong ('YDPA') telah mengeluarkan suatu Proklamasi Darurat ('Proklamasi') menurut perkara 150(1) Perlembagaan Persekutuan ('PP'). Enam belas hari kemudian, pemohon, seorang ahli Parlimen dan ahli Dewan Undangan Negeri, telah memohon kepada Mahkamah Tinggi untuk kebenaran bagi memfailkan permohonan semakan kehakiman memohon: (a) satu deklarasi bahawa ss 11, 14 dan 15 Ordinan Darurat (Kuasa-Kuasa Perlu) 2021 ('Ordinan') (yang telah dimasyhurkan oleh YDPA di bawah Darurat) adalah tidak sah, tidak berperlembagaan serta terbatal dan tidak sah kerana tidak selaras dengan peruntukan PP; (b) satu deklarasi bahawa perkara 150(8) PP (klausa penyingkiran) adalah tidak berperlembagaan, terbatal dan tidak sah serta tidak berkuat kuasa kerana tidak selaras dengan perkara-perkara 4(1) dan 121(1) PP; secara alternatif, bahawa perkara 150(8) tidak menghalang mahkamah daripada membuat semakan kehakiman terhadap pelaksanaan kuasa di bawah Ordinan; (c) satu deklarasi bahawa responden-responden terikat dengan

kewajipan di bawah perkara 150(3) PP untuk menasihati YDPA untuk memanggil Parlimen untuk Proklamasi dan Ordinan dibentangkan di hadapan kedua-dua Majlis Parlimen untuk semua semua ketetapan yang perlu dan sesuai untuk diluluskan menurut perkara 150(3); (d) perintah-perintah mandamus mengarahkan responden-responden untuk membentangkan Proklamasi dan Ordinan di hadapan kedua-dua Majlis Parlimen berlandaskan peruntukan perkara 150(3); secara alternatif, untuk menasihati YDPA untuk memanggil mesyuarat Parlimen menurut peruntukan perkara 150(3). Perkara 150(6) memperuntukkan, antara lain, bahawa tiada peruntukan mana-mana Ordinan yang dimasyhurkan di bawah perkara 150 hendaklah menjadi tidak sah atas alasan tidak selaras dengan mana-mana peruntukan PP. Perkara 150(8) memperuntukkan bahawa walau apa pun apa-apa jua dalam PP, pengeluaran Proklamasi atau pengisytiharan oleh YDPA untuk mana-mana Ordinan tidak boleh tertakluk kepada sebarang cabaran atau dipersoalkan di dalam mana-mana mahkamah atas apa-apa alasan dan bahawa tiada mahkamah boleh mempunyai bidang kuasa untuk melayan atau memutuskan apa-apa permohonan, soal atau prosiding, dalam apa-apa juabentuk, atas apa-apa alasan, mengenai kesahan atau kuat kuasa berterusan sama ada Proklamasi atau mana-mana Ordinan yang dimasyhurkan di bawah perkara 150(2B) PP.

Diputuskan, menolak permohonan untuk kebenaran:

(1) Memandangkan halangan dalam klausa-klausa (6) dan (8) kepada perkara 150 Perlembagaan Persekutuan ('PP') tidak dapat diatasi, mahkamah tidak dapat membenarkan permohonan pemohon untuk kebenaran. Perkataan dalam perkara 150(8) cukup eksplisit untuk merangkumi permohonan untuk kebenaran bagi memfailkan semakan kehakiman (lihat perenggan 21 & 32).

(2) Perkara 150(8) dilihat sebagai memberikan *bar* berganda kepada pemeriksaan kehakiman kerana ia dimulakan dengan kata-kata 'Notwithstanding anything in this Constitution' yang menunjukkan bahawa perkara 150(8) bukan hanya terpakai mengatasi mana-mana undang-undang lain, tetapi bahawa ianya juga menggantikan mana-mana peruntukan lain di dalam PP. Dengan itu, perkara 150(8) mengatasi bukan sahaja perkara 121 tetapi juga perkara-perkara 43, 44 dan 71 juga — peruntukan-peruntukan yang dikemukakan oleh pemohon tidak selaras dengan perkara 150 PP (lihat perenggan 22).

(3) Perkara 150(6) PP memperuntukkan bahawa tiada peruntukan mana-mana Ordinan yang dimasyhurkan di bawah perkara 150, dan tiada peruntukan mana-mana Akta Parlimen yang diluluskan semasa Proklamasi Darurat berkuat kuasa dan yang mengisytiharkan bahawa undang-undang yang didapati oleh Parlimen sebagai dikehendaki oleh sebab Darurat, hendaklah menjadi tidak sah atas alasan tidak selaras dengan mana-mana peruntukan PP (lihat perenggan 19).]

Cases referred to

All Basotho Convention (ABC) v Prime Minister [2020] 4 LRC 466, HC (refd)
Bavadra v Attorney-General [1988] LRC (Const) 13, SC (refd)
Dato' Seri Anwar bin Ibrahim v PP [2002] 3 MLJ 193; [2002] 3 CLJ 457, FC (folld)
Eng Keock Cheng v PP [1966] 1 MLJ 18; [1965] 1 LNS 36, FC (refd)
Fung Fon Chen @ Bernard & Anor v The Government of Malaysia & Anor [2012] 6 MLJ 724; [2012] 6 AMR 397, HC (refd)
George John v Goh Eng Wah Bros Filem Sdn Bhd [1988] 1 MLJ 319; [1987] 1 LNS 111 (refd)
Henry v Geopresco International Ltd [1975] 2 All ER 702, CA (refd)
Kamal and Others v State [2007] 4 LRC 800, HC (refd)
Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad [2004] 5 MLJ 495, HC (folld)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (folld)
Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor [2021] 1 MLJ 750, FC (refd)
Phang Chin Hock v PP [1980] 1 MLJ 70, FC (refd)
Minister of Home Affairs v Austin [1987] 1 LRC (Const) 567, SC (refd)
Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793, SC (refd)
Mohamed Nordin bin Johan v Attorney-General, Malaysia [1983] 1 MLJ 68; [1983] 1 CLJ 130; [1983] CLJ Rep 271, FC (refd)
Namwandu v Attorney General [1972] EA 108 (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657; [1994] 2 AMR 929, SC (refd)
Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening) [2019] 3 WLR 589, SC (refd)
R (on the application of Privacy International) v Investigatory Powers Tribunal and others [2019] UKSC 22, SC (refd)
Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals [2021] 2 MLJ 822; [2021] 4 CLJ 1, FC (refd)
Southern Highlands Provincial Government v Somare and Others [2008] 2 LRC 373, SC (refd)
Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors [2006] 5 MLJ 60; [2006] 1 CLJ 927, CA (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50; [1978] 1 LNS 202, PC (refd)
Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35, CA (folld)
Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors [2011] 1 MLJ 128; [2010] 1 LNS 1390, HC (folld)

A *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, FC (refd)
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor [2003] 5 MLJ 128; [2003] 1 CLJ 210, HC (refd)

B **Legislation referred to**

Emergency (Essential Powers) Ordinance 2021 ss 11, 14, 15
Federal Constitution arts 4, 4(1), 43, 44, 71, 121, 121(1), 150, 150(1), (2), (3), (6), (8)
Immigration Act 1959/63
C Prevention of Crime Act 1959
Rules of Court 2012 O 53 r 3

Gurdial Singh Nijar (Christopher Leong Sau Foo, Razlan Hadri bin Zulkifli, Abdullah Abdul Rahman, Abraham Au, Danny Soong Hou Ming, Muhammad Hiqmar Danial bin Hidzir and Nirvan Gopalan Krishnan with him) (Chooi & Co + Cheang & Ariff) for the applicant.
D *Narkunavathy Sundareson (Ahmad Hanir bin Hambaly, Mazlifah bt Ayob, and Safiyyah bt Omar with her) (Senior Federal Counsels, Attorney General's Chambers) for the respondents.*
E *Steven Thiru (Abdul Rashid Ismail, Gregory Das and Azreen Ahmad Rastom with him) watching brief for the Malaysian Bar.*

Evrol Mariette Peters JC:

F INTRODUCTION

[1] The applicant is a member of the Dewan Rakyat for Pasir Gudang and also a member of the State Legislative Assembly of Johor. This was his application for leave for judicial review ('this application'), for the following
G reliefs:

(a) declarations that ss 11, 14 and 15 of the Emergency (Essential Powers) Ordinance 2021 ('the Ordinance') published in the Federal Government *Gazette* PU (A) 12/2021 on 14 January 2021 are invalid and unconstitutional, and therefore null and void; by virtue of their
H inconsistency with the provisions of the Federal Constitution;

(b) a declaration that art 150(8) of the Federal Constitution is unconstitutional, and therefore null and void and of no legal effect, pursuant to being inconsistent with arts 4(1) and 121(1) of the Federal
I Constitution, and as a result null and void and of no legal effect; alternatively, and in any event, that art 150(8) of the Federal Constitution does not preclude the court from judicially reviewing the exercise of power under the Ordinance;

(c) a declaration that the respondents are under a constitutional duty

pursuant to art 150(3) of the Federal Constitution to advise the Yang di-Pertuan Agong ('YDPA') to summon the Parliament for the Proclamation of Emergency and Ordinance to be laid before both Houses of Parliament for all necessary and appropriate resolutions to be passed in accordance with the mandatory provisions of art 150(3) of the Federal Constitution; and

(d) orders of mandamus either directing the respondents to lay the Proclamation of Emergency dated 11 January 2021 published in the Federal Government *Gazette* PU (A) 7/2021 on 12 January 2021 ('Proclamation of Emergency') and the Ordinance before both Houses of Parliament in accordance with the mandatory provisions of art 150(3) of the Federal Constitution; or alternatively, to advise the YDPA to summon a meeting of the Parliament, in accordance with the mandatory provisions of art 150(3) of the Federal Constitution.

THE BACKGROUND FACTS

[2] On 11 January 2021, a Proclamation of Emergency was made by the YDPA pursuant to art 150(1) of the Federal Constitution. This Proclamation of Emergency was made following the presentation of the advice of the Cabinet by the first respondent, the Prime Minister.

[3] On 27 January 2021, the applicant filed an application for judicial review. The attorney general ('AG') on 4 February 2021 then filed an application in encl 8 to transfer these proceedings to the Kuala Lumpur High Court. The application to transfer was dismissed, and this court proceeded to hear this application on 30 March 2021, which the AG had objected to, but which was eventually dismissed for the following reasons.

THE APPLICABLE LAW

[4] The starting point for any application for leave for judicial review is O 53 r 3 of the Rules of Court 2012 ('the Rules of Court') which reads:

Order 53 — *Application for judicial review*

Rule 3 — *Leave*

(1) An application under this Order shall not be made unless leave therefor has been granted in accordance with this rule.

(2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

(4) The Judge may, in granting leave, impose such terms as to costs and as to the giving of security as he thinks fit.

(5) The grant of leave under this rule shall not, unless the Judge so directs, operate as a stay of the proceedings in question.

(6) An application for judicial review shall be made promptly and in any event within three months from the date when the grounds of application first arose or when the decision is first communicated to the applicant.

(7) The Court may, upon an application, extend the time specified in rule 3(6) if it considers that there is a good reason for doing so.

(8) An application to extend time must be served on all respondents and shall be heard *inter partes*.

[5] It has been established by a plethora of cases including *George John v Goh Eng Wah Bros Filem Sdn Bhd* [1988] 1 MLJ 319; [1987] 1 LNS 111, *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v Datuk Bandar Kuala Lumpur & Anor* [2003] 5 MLJ 128; [2003] 1 CLJ 210, *Mohamed Nordin bin Johan v Attorney-General, Malaysia* [1983] 1 MLJ 68; [1983] 1 CLJ 130; [1983] CLJ Rep 271, *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2006] 5 MLJ 60; [2006] 1 CLJ 927 and *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, that the court has to adopt a flexible approach at the application for leave stage.

[6] In *Tang Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*, it was stated by Gopal Sri Ram JCA (as he then was), in the following passage:

> What is the approach the High Court should take when considering an application for leave to issue judicial review? The answer to that question is to be found in the following passage in the speech of Lord Diplock in *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 643:
>
> > The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief.
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> [10] To paraphrase in less elegant language what has been said in these cases, the High Court should not go into the merits of the case at the leave stage. *Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of time or against a person or body that is immunised from*

being impleaded in legal proceedings then the High Court would be justified in refusing leave in limine. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament (see art 63 of the Federal Constitution). (Emphasis added.)

[7] Reference was made also to *WRP Asia Pacific Sdn Bhd v Tenaga Nasional Bhd* [2012] 4 MLJ 296; [2012] 4 CLJ 478, where the threshold for leave was explained by Suriyadi Halim FCJ, in the following passage:

Without the need to go into depth of the abundant authorities, suffice if we state that leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favour of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though ie, unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged.

[8] Although I agree with the applicant that the threshold is not a high one, it is crucial to bear in mind that the court must first be clothed with the jurisdiction to entertain this application.

CONTENTIONS, EVALUATION, AND FINDINGS

Whether the role of the AG was limited

[9] Both the applicant and the Malaysian Bar (which held a watching brief on this application) submitted that the role of the AG at this stage was limited, and that they did not possess locus to object to this application.

[10] I am unable to agree with such contention as I drew guidance from the case of *Kanawagi a/l Seperumaniam v Dato' Abdul Hamid bin Mohamad* [2004] 5 MLJ 495, where it was elucidated by Faiza Tamby Chik J:

3. As the law on the participation of the AG's Chambers and the respondents are distinct, I will take these two issues separately, starting with the AG's role. When an applicant files an application for leave for a judicial review remedy, he has to serve all the papers on the AG. The service on the AG's Chambers of the applicant's ex parte application is mandatory as per RHC, O 53 r 3(3) which states:

> The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavit.

4. There is a good reason why the applicant is required to serve the cause papers on the AG. The rule is based on the principle that judicial review is a principal tool of 'public law' applicable to 'public' bodies in claims brought before a specialised administrative court. In Malaysia, this administrative court is the High Court in its

originating jurisdiction. As public bodies impliedly attract public interest and the guardian of public interest is the AG this provision makes the AG a nominal party in all judicial review applications. *The intention of this rule was to ensure that the AG vets all judicial review applications in order to ascertain if his participation is warranted. Whether the AG elects to appear or not is solely at his discretion*. And if the AG does elect to appear by himself or his representative then the court is bound to give a hearing and thereafter decide the matter. *The court has no jurisdiction not to hear the AG.* However if the AG appears it is for the AG to show the public element involved in the application and to either support or oppose the application. However, if there is no public element involved, there is no need for the AG to appear and it would be implied that the non-appearance of the AG would mean that the application did not touch issues of public interest. This takes me to the next question as what is the meaning of 'public interest' in order for the AG to intervene. I found one in a US case which defined 'public interest' as:

> ... Public interest ... is that interest shared by all citizens in general and by the community at large concerning pecuniary or legal liabilities. (Emphasis added.)

[11] I also found instructive the following comments by Varghese George Varughese JCA in *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35, in the following passage:

> [17] This then brings me to the significance of the Honourable Attorney-General's input at the leave stage of a judicial review application. It is trite that the 'leave' proceedings are intended to sieve out unwanted or frivolous applications before it moves to the substantive stage of proceedings. The assistance required by the court from the Attorney-General's Chambers at this stage, in that context, was to appraise the court of any particular features of the case that would disqualify any leave being granted to the applicant concerned ...
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> ...
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> [19] The role of the Honourable Attorney-General's Chambers at the leave stage was therefore only to bring to the court's attention any features surrounding that particular complaint that need to be taken into consideration by the court before the leave applied for was granted or refused.

[12] As such, the involvement of the AG in this application was proper as his presence was to assist the court in determining if there was any aspect of the case that should render a dismissal of this application.

Difference between justiciability and jurisdiction

[13] The applicant, in citing several cases including *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2019] 3 WLR 589, *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015]

MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35, and *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 1 MLJ 750 ('Maria Chin'), contended that since the issue in the present case concerned the lawful limits of power, and if such limits had been exceeded, the matter was, therefore, justiciable, and that leave should be granted; alternatively, that justiciability was a matter that should be addressed at the substantive motion of the judicial review, and not at this stage.

[14] At this juncture, it is crucial to distinguish between jurisdiction and justiciability. Although frequently used interchangeably, 'jurisdiction' is conferred upon a court by law, whereas 'justiciability' is concerned with the appropriateness of the matter to be determined. In the Supreme Court case of *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657; [1994] 2 AMR 929, Edgar Joseph Jr SCJ had remarked in the following passage:

> The term refers to real and substantial controversy which is appropriate for judicial determination, as distinguished from dispute or difference of contingent, hypothetical or abstract character. *Guimarin & Doan, Inc v Georgetown Textile & Mfg Co* 249 SC 561, 155 SE 2d 618, 621. To take the point further, the concept of justiciability requires consideration of the subject matter of the question at issue, the manner of its presentation and the appropriateness of judicial adjudication in the light of these factors. Appropriateness in this context may be determined according to both institutional and constitutional standards which in turn require consideration of both the adequacy of judicial machinery for the task as well as the legitimacy of using it.

[15] I drew guidance from the case of *Tengku Muhammad Fakhry Petra Ibni Sultan Ismail Petra v Yang Maha Mulia Pemangku Raja Kelantan & Ors* [2011] 1 MLJ 128; [2010] 1 LNS 1390, where the meaning of 'justiciability' was explained by Mohamad Ariff Md Yusof J (as he then was), in the following passage:

> Justiciability relates to the sixth ground stated above — whether judicial review is an appropriate procedure. It can be subsumed even under grounds (v) and (iv). The issue can also be stated as whether the subject matter is 'amenable to judicial process', a phrase which appears in the House of Lords decision in *CCSU v Minister for the Civil Service* [1984] 3 All ER 71, per Lord Roskil. Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination.
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> ...
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> A good definition of 'justiciability' can also be found in Chris Finn, *The Concept of 'Justiciability' in Administrative Law* in Groves & Lee, Australian Administrative Law (2007):

> The term 'justiciability' refers to the suitability for, or amenability to, judicial review of a particular administrative decision or class of decisions. The term derives from the common law and reflects a series of self-imposed judicial restraints, themselves founded in a view as to the appropriate constitutional balance between the respective roles of the executive and the judiciary. Thus, a matter may be deemed 'non-justiciable' by a Court which feels that its resolution either is beyond the institutional competence of the Court or would involve stepping outside its appropriate constitutional role (at p 143).

[16] Reference was made also to *Fung Fon Chen @ Bernard & Anor v The Government of Malaysia & Anor* [2012] 6 MLJ 724; [2012] 6 AMR 397, and *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] MLJU 213; [2015] MLJU 2039; [2015] MLJU 2268; [2015] 3 AMR 35 on the concept of justiciability, and its difference from jurisdiction.

Implications of cll 6 and 8 of art 150 of the Federal Constitution

[17] This application pivoted upon the jurisdiction of the court with regard to the Proclamation of Emergency, in light of cll 6 and 8 of art 150 of the Federal Constitution; and in this application, the applicant sought to challenge ss 11 and 14 –15 of theOrdinance which was promulgated by the YDPA pursuant to art 150(2) of the Federal Constitution, all of which read:

> Article 150 — Proclamation of Emergency
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> ...
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> (2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.
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> *Emergency (Essential Powers) Ordinance 2021*
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> Section 11 — Executive and legislative powers
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> For so long as the emergency is in force —
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> (a) The Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the executive authority of the Federation and such other persons who have been conferred the executive functions by law shall continue to exercise such functions;
>
> (b) The Menteri Besar or Chief Minister and the State Executive Council or State Cabinet of the respective States existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021 who have been conferred the executive functions shall continue to exercise the

executive authority of the States and such other persons who have been conferred the executive functions by law shall continue to exercise such functions; and

(c) The legislative functions to make subsidiary legislation under Federal laws and State laws shall continue to be exercised by the persons so authorised by such laws;

Section 14 — Parliament Sitting

(1) For so long as the emergency is in force —

(a) The provisions relating to the summoning, proroguing and dissolution of Parliament in the Federal Constitution shall not effect; and

(b) The Parliament shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong thinks appropriate;

(c) Any meeting of the Parliament which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

Section 15 — Sitting of State Legislative Assembly

(1) For so long as the emergency is in force —

(a) the provisions relating to the summoning, proroguing and dissolution of a State Legislative Assembly in the Eighth Schedule to the Federal Constitution, Constitution of any State and any State law shall not have effect; and

(b) a State Legislative Assembly shall be summoned, prorogued and dissolved on a date as the Yang di-Pertuan Agong things appropriate after consultation with the respective Ruler or the Yang di-Pertua Negeri.

(2) Any meeting of a State Legislative Assembly which has been summoned before the coming into operation of this Ordinance but has not been held is cancelled.

[18] However, as alluded to above, the issue that first had to be determined was whether this court had jurisdiction with regard to this application, and to address that, reference was made to art 150 of the Federal Constitution, in particular cll 6 and 8 which read:

Article 150 — Proclamation of Emergency

...

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to

A Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

...

(8) Notwithstanding anything in this Constitution —

B (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of —

C (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

D (iii) ordinance promulgated under Clause (2B); or

(iv) e continuation in force of any such ordinance.

...

E

[19] At this juncture, it is fundamental to note that in art 150(6) of the Federal Constitution, it is stated that no legislation enacted pursuant to a Proclamation of Emergency shall be invalid on the ground of inconsistency with any provision of this Constitution. Clause 6 is clear and was explained in the ruling of Wylie (Borneo) CJ in *Eng Keock Cheng v Public Prosecutor* [1966] 1 MLJ 18; [1965] 1 LNS 36, in the following passage:

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> The court was referred to a number of Indian cases dealing with the question of excessive delegation of the legislative function under a written Constitution which confers authority to exercise that function on a legislature established under that Constitution. It does not appear that, in any of the cases cited, the legislation that was challenged, was enacted pursuant to a power such as that conferred by cl (6) of art 150. *If the legislation is enacted under a power which gives it validity notwithstanding any inconsistency with the Constitution, it becomes unnecessary to consider whether the legislation would, apart from the exercise of that power, be inconsistent with any part of that Constitution.* Consequently, these authorities do not assist in determining the fundamental issue involved in considering this part of the argument.
>
> *The true effect of art 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved.* This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution. (Emphasis added.)

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[20] Both the applicant and the AG had submitted extensively on the implications of the ouster provision in cl 8 of art 150 of the Federal Constitution, and to support their respective arguments, they relied on several cases including *Maria Chin* and *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822; [2021] 4 CLJ 1 ('Rovin Joty'). My interpretation of the cases of *Maria Chin* and *Rovin Joty* is that ouster clauses are not per se or automatically invalid for being unconstitutional, and that art 121 of the Federal Constitution expressly empowers Parliament to prescribe the extent of limits of the court's powers and jurisdiction. As such, it was within the competence of Parliament to legislate, pursuant to the powers conferred on it by art 121 of the Federal Constitution, which reads:

Article 121 — Judicial power of the Federation

(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely —

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di- Pertuan Agong may determine;

(c) (Repealed),

and such inferior courts as may be provided by federal law and *the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.*

(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

(2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Federal Court shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law.

(3) Subject to any limitations imposed by or under federal law, any order, decree, judgment or process of the courts referred to in Clause (1) or of any judge thereof shall (so far as its nature permits) have full force and effect according to its tenor throughout the Federation, and may be executed or enforced in any part of the Federation accordingly; and federal law may provide for courts in one part of the Federation or their officers to act in aid of courts in another part.

(4) In determining where the principal registry of the High Court in Sabah and Sarawak is to be, the Yang di-Pertuan Agong shall act on the advice of the Prime Minister, who shall consult the Chief Ministers of the States of Sabah and Sarawak and the Chief Judge of the High Court. (Emphasis added.)

[21] It was also stated in *Maria Chin*'s case, relying on the UK Supreme Court decision of *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22, that judicial review can be excluded by 'the most clear and explicit words'. In my view, art 150(8) of the Federal Constitution is clearer than crystal, as it states that 'no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity ...'. The words are explicit enough to exclude even an application for leave for judicial review, such as this.

[22] What also needs to be underscored in this application is that in both *Maria Chin* and *Rovin Joty*, the Federal Court was dealing respectively with provisions in the Immigration Act 1959/63 and the Prevention of Crime Act 1959. In this case, the ouster clause was in the Federal Constitution itself, namely art 150. Therefore, if ousting or restricting judicial review in federal law is not invalid per se, *a fortiori* a provision in the Federal Constitution which explicitly excludes the jurisdiction of the court is not invalid. In fact, art 150(8) of the Federal Constitution appears to provide a double bar to judicial scrutiny, as it is prefaced with the words: 'Nothwitstanding anything in this Constitution', which is indicative that art 150(8) not only prevails over any other law, it also supersedes any other provision in the Federal Constitution. As such, art 150(8) overrides not only art 121, but arts 43–44 and 71 as well, provisions which the applicant contended are inconsistent with art 150 of the Federal Constitution.

[23] I drew guidance from the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2002] 3 MLJ 193; [2002] 3 CLJ 457, speaking through

Haidar Mohd Noor FCJ, in the following passage:

> Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art 150 (the proclamation of emergency). *It should be noted that there is the overriding provision in cl (8)(b) of art 150 itself that 'notwithstanding anything in this Constitution' the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinance*. (Emphasis added.)

[24] The applicant also contended that art 150 of the Federal Constitution was unconstitutional as it was inconsistent with art 4 which reads:

> Article 4 — Supreme law of the Federation
>
> (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> (2) The validity of any law shall not be questioned on the ground that —
>
> (a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or
>
> (b) it imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.
>
> (3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or —
>
> (a) if the law was made by Parliament, in proceedings between the Federation and one or more States;
>
> (b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.
>
> (4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

[25] At this juncture, it is crucial to appreciate that the meaning of 'law' in art 4 is confined to ordinary laws and does not apply to Acts enacted to amend the Federal Constitution. This was clarified in several cases including *Maria Chin, Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793, *Loh Kooi Choon v*

Government of Malaysia [1977] 2 MLJ 187, and *Rovin Joty.*

[26] Bearing in mind that cl 8 was incorporated into art 150 of the Federal Constitution in 1981 vide Constitution (Amendment) Act 1981 (Act A514), it is evident that the applicant's contention was untenable. In fact, the purpose for the introduction of cl (8), is provided in the following Explanatory Note to the Constitution (Amendment) Bill:

> The new Clause (8) seeks to provide that the satisfaction of the Yang di- Pertuan Agong under Clause (1) and Clause (2B) is *final and conclusive, and cannot be challenged or called in question in any court or on any ground*. This Clause also provides that *no court shall have jurisdiction* in relation to the validity of a Proclamation issued under Clause (1) or any declaration made in such Proclamation, or the continued operation of such Proclamation, or in relation to any ordinance promulgated under clause (2B) or the continuation in any such ordinance. (Emphasis added.)

[27] The rationale for the introduction of cl 8 into art 150 of the Federal Constitution is clear, and that its *raison d'etre* was the case of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50; [1978] 1 LNS 202, where it was suggested by Lord Diplock, in the following passage, that a Proclamation of Emergency announced by the YDPA was reviewable by the court, as it is, in fact, the decision of the Cabinet:

> This, however, does not mean, as the appellant would have it, that the Security Area Proclamation can be treated by the court as having lapsed ipso facto as soon as there are no longer any grounds for considering it still to be necessary for the particular purpose described in s 47 for which it was originally made. Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the Courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di- Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the Proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, *mandamus could*, in their Lordships' view, *be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation*.(Emphasis added.)

[28] In light of the purpose and intent of cl 8 of art 150 of the Federal Constitution, it was all the more imperative that this application should be dismissed. It is at this juncture that the role of the judge comes to the forefront, and the approach that I would subscribe to, in light of the clarity of the provisions, is the technique prescribed by Patrick Devlin in his book, *The Judge*, where he states:

> Should judges be lawmakers, law reformers, and even social reformers? In the exercise of their craft they must be handymen, but I do not think they should aim higher. It is their job to apply the law and they must try to make it fit, but new suits and new fashions should be designed by legislators ... What is the business of a court of law? To make law or to do justice according to law? This question should be given a clean answer. *If the law and justice of the case require the court to give a decision which its members think will not make good law for the future, I think the court should give the just decision and refer the future to a law-making body.* (Emphasis added.)

[29] The provisions are clear enough not to warrant any form of judicial activism. 'It is the province of the courts to expound the law and the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction': per Roskill LJ in *Henry v Geopresco International Ltd* [1975] 2 All ER 702.

[30] I have to add that a judge is not appointed to subscribe to the views of the *vox populi*. As such, those who feel aggrieved by any legislation, must address themselves to the legislature, and not the courts. As aptly expressed by Raja Azlan Shah in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, 'they have their remedy at the ballot box'.

[31] There was heavy reliance by both the applicant and Malaysian Bar on authorities from the UK such as *Regina (Miller) v Prime Minister (Lord Advocate and others intervening); Cherry and others v Advocate General for Scotland (Lord Advocate and others intervening)* [2019] 3 WLR 589, and other commonwealth jurisdictions including (Lesotho) *All Basotho Convention (ABC) v Prime Minister* [2020] 4 LRC 466, (Papua New Guinea) *Southern Highlands Provincial Government v Somare and Others* [2008] 2 LRC 373, (Bangladesh) *Kamal and Others v State* [2007] 4 LRC 800, (Fiji) *Bavadra v Attorney-General* [1988] LRC (Const) 13, (Zimbabwe) *Minister of Home Affairs v Austin* [1987] 1 LRC (Const) 567, and (Uganda) *Namwandu v Attorney General* [1972] EA 108. Although the applicant's submission was thoroughly researched and eloquently articulated by his counsel, I was unable to agree with him, lest I miss the forest for the trees, because in my view, all roads in this application led to the clear wording of cll 6 and 8 of art 150 of the Federal Constitution. I also drew guidance from the advice of Raja Azlan Shah FCJ in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 to tread carefully when dealing with the constitutions of other jurisdictions, in light of our own Federal Constitution. In the following passage, His Lordship remarked:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and *it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions'* — see *Adegbenro v Akintola & Anor* [1963] 3 All ER 544, 551. Each country frames its

A constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law. (Emphasis added.)

B **[32]** Since the impediments in cll 6 and 8 of art 150 of the Federal Constitution remained unsurmounted, this court was unable to allow this application as its hands are tied by the Federal Constitution, which is and remains the Kelsenian grundnorm of this country. Pursuant to the pure theory of law advocated by Hans Kelsen, the grundnorm or Constitution, in the C present case, demands obedience that is free from any form of social or political consideration (see Hans Kelsen, *General Theory of Norms*).

[33] Much has been said by the applicant about the injustice that would result if the court was to shut the door to this application, which had merely D sought leave for judicial review. However, the analogy is this: the door is locked by virtue of art 150(8) of the Federal Constitution. Even if that door is unlocked, there is no guarantee that the court would automatically open it, and grant leave; but at this point in time, the court is not even in possession of the key, and without that key, the inexorable conclusion is that it would be E impossible for the court to open the door.

CONCLUSION

[34] In the upshot, based on the aforesaid reasons, and after careful scrutiny F and judicious consideration of submissions of counsel for all parties, this application was dismissed.

Application dismissed.

G Reported by Ashok Kumar

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